Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GREGORY ARTHUR OTT	§	
VS.	§	CIVIL ACTION NO.
	§	4:97cv301
DIRECTOR, TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

(Filed Apr. 14, 1998)

Petitioner Gregory Arthur Ott, an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The case was referred pursuant to 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge, for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

Petitioner is serving a life sentence for the murder of a Texas Ranger in Denton County. Presently pending before the court is respondent's motion to dismiss pursuant to 28 U.S.C. § 2244.

Petitioner, proceeding through present counsel, filed his state application for writ of habeas corpus on April 23, 1997, nearly nineteen years after being convicted. The

Texas Court of Criminal Appeals denied the application without written order on September 17, 1997. Petitioner filed the present petition on September 23, 1997.

The respondent's motion relies upon the circuit decisions which require the petitioner to file his petition on or before April 23, 1997, in order to be considered timely. *See Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, ___ U.S. ___, 117 S.Ct. 2059 (1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997); *Calderon v. United States Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1286-1287 (9th Cir. 1997). The Seventh, Ninth and Tenth Circuits held that a petitioner is allowed to file a timely petition if it is filed before April 24, 1997. Thus, the last day to file a timely petition would be April 23, 1997. More recently, the Third Circuit has joined the sister circuits in holding that the last date for filing a timely petition would be April 23, 1997. *Burns v. Morton*, 134 F.3d 109, 111 (3rd Cir. 1998).

Petitioner recognized a conflict between these circuit decisions and FED. R. CIV. P. 6(a), which provides;

> In computing any period of time prescribed by . . . any applicable statute, the day of the act, event, or default from which the designated period of time begins to run *shall not* be included. (emphasis added)

Rule 6(a) further provides that when the last day falls on a Saturday, Sunday or legal holiday, that day shall not count. Rule 6(e) provides the party an additional three days if the notice is submitted by mail.

The conflict between the circuits and Rule 6 has been argued previously before the Tenth Circuit. In *United*

States v. Hutchinson, No. 97-6359 and *United States v. Williams*, 97-6264 both 1998 WL 94600 unpublished opinion (10th Cir. March 5, 1998). The Tenth Circuit came to the conclusion that *Simmonds* was controlling and denied two motions to vacate as untimely because they were filed on April 24, 1997. The unpublished opinion cites a "well established rule" of excluding the date the event occurred. However, Rule 6 is something more than a well established rule, it is the means by which limitations are to be calculated. As petitioner notes, Rule 6 is used in calculating federal limitations periods when borrowing state limitations periods. *Merriweather v. City of Memphis*, 107 F.3d 396, 398 (6th Cir. 1997). However, every circuit opinion that has reviewed this issue has failed to look at the plain language of Rule 6. Absent controlling precedent from the Fifth Circuit, this court will apply Rule 6 to the limitations period found in 28 U.S.C. § 2244 to determine if the current petition should be dismissed as time barred.

Rule 6(a) allows that the last day to file the petition would be April 24, 1997, which is one year after April 24, 1996, excluding the day the AEDPA took effect. Petitioner filed his state application on April 23, 1997, one day before limitations expired. Thus, petitioner had one day left on his limitations period.

Petitioner's state application tolled limitations pursuant to 28 U.S.C. § 2244(d)(2). The petition was denied September 17, 1997, and the denial was mailed to the petitioner. The mail provision of Rule 6(e) would allow a timely petition to be filed on or before September 21,

1997.[1] Because September 21, 1997 was Sunday, Rule 6 allows that the petition would be timely if filed on the following day September 22, 1997.[2] The petition was filed on September 23, 1997.

Petitioner asserts that the one year limitations should be tolled further by equitable tolling or the ninety days he would be allowed to file a petition for writ of certiorari in the Supreme Court. *See* SUPREME COURT RULES Rule 13(1). Petitioner cites an unpublished case from the Southern District of New York which allegedly would allow a ninety day tolling on direct review. In *Albert v. Strack*, 97cv2978 (SS) 1998 Lexis 129 (S.D.N.Y. January 13, 1998) petitioner filed his petition on April 14, 1997, within the one year limitations period as determined by at least four circuits. However, the Second Circuit has established a "reasonable time" provision pursuant to *Peterson v. Demskie*, 107 F.3d 92, 93 (2nd Cir. 1997).[3] The District Court interpreted the "reasonable time" holding in accordance with *Peterson* and found that petitioner had a reasonable time to file the petition. The petition was dismissed as untimely.[4] The provision cited for a 90 day

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[1] Petitioner received the notice from the Texas Court of Criminal Appeals on September 20, 1997.

[2] Petitioner asserts that Saturday and Sunday should be excluded. However, this is not supported by the plain language of Rule 6.

[3] *Peterson* is not consistent with the Supreme Court's decision in *Lindh* and is of questionable value because it was decided several months prior to the Supreme Court's decision in *Lindh*.

[4] This court does not agree with the holding in *Albert*. As previously stated, the petition, absent a retroactive application, would have been timely if filed by April 24, 1997.

extension by the district court is 28 U.S.C. § 2244(d)(1)(A) which allows limitations [sic] begin at the conclusion of a direct review *or the expiration of the time for seeking such review.* Petitioner asserts this provision should apply to state collateral proceedings tolled by 28 U.S.C. § 2244(d)(2). The wording of this provision does not support such a conclusion. This provision allows tolling only for the time in which "a properly filed application for State post-conviction or other collateral review . . . is pending." If the court considered the time in which a petitioner could file a state application or could file a petition for certiorari from the denial of the application, the limitations provision would become meaningless. Thus, the time that an action could be taken during collateral review cannot be considered in tolling limitations.

Petitioner asserts he is entitled to equitable tolling. The Ninth Circuit has repeatedly allowed equitable tolling of the limitations period based upon the limitations period not restricting the jurisdiction of the court. *See Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal,* 128 F.3d 1283 (9th Cir. 1997), *cert. denied,* ___ U.S. ___, 118 S.Ct. 899 (1998); *Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.,* 127 F.3d 782 (9th Cir. 1997). In reviewing petitioner's current pleadings, this court declines to recommend that equitable tolling be considered in this matter given the date of the conviction and the proceedings that have occurred over the past nineteen years. Petitioner has not offered any compelling circumstances that would require tolling.

Petitioner is outside the statute of limitations by one day and the present petition should be dismissed as untimely.

Recommendation

The petition for a writ of habeas corpus should be dismissed as beyond limitations.

Objections

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained within this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings and legal conclusions accepted or adopted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

SIGNED this 27th day of March, 1998.

/s/ Robert Faulkner
ROBERT W. FAULKNER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GREGORY ARTHUR OTT	§	
VS.	§	CIVIL ACTION NO.
	§	4:97cv301
DIRECTOR, TDCJ-ID	§	

MEMORANDUM ORDER REVIEWING OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Sept. 1, 1998)

Petitioner Gregory Arthur Ott, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court heretofore referred this matter to the Honorable Robert W. Faulkner, United States Magistrate Judge, at Sherman, Texas, for consideration pursuant to applicable laws and orders of this court. The court has received and considered the Report of the United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Both parties submitted objections to the Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

The issue for review concerns the application of the limitation provision of 28 U.S.C. § 2244(d) to the above-styled habeas corpus petition. Petitioner filed a state application for writ of habeas corpus on April 23, 1997, nearly nineteen years after the underlying conviction.

The Texas Court of Criminal Appeals denied the application on September 17, 1997. The present petition was filed on September 23, 1997. The magistrate judge recommends the petition be dismissed as time barred.

Respondent's objections assert FED. R. CIV. P. 6(e) should not apply to the time period after the Texas Court of Criminal Appeal's denial. This court agrees in accordance with the authority cited by the respondent. However, this determination does not undermine the magistrate judge's recommendation.

Petitioner's objections assert (1) Saturday and Sunday should be excluded from computation pursuant to FED. R. CIV. P. 6, (2) Supreme Court Rule 13 should apply allowing petitioner an additional ninety days from the time the Texas Court of Criminal Appeals denies relief in state habeas matters, (3) he should receive the benefit of equitable tolling because he was awaiting the decision in *Johnson v. Rodriguez*, 110 F.3d 299, 302-03 (5th Cir. 1997), *cert. denied*, 118 U.S. 559 (1997), prior to bringing his parole claim in the current petition and the "white card" action by the Texas Court of Criminal Appeals, and (5) lastly, petitioner asserts he has sound evidence that he is actually innocent of the underlying murder for which he stands convicted.

Petitioner's argument regarding not counting Saturday and Sunday in limitation computations is without merit and no authority is cited for petitioner's view. Petitioner's second claim regarding Supreme Court rule 13 is unresolved in the courts. However, the plain language requirement of a "properly filed" State post-conviction or other collateral review proceeding found in 28

U.S.C. § 2244(d)(2) does not allow for consideration of time in which a pleading could be filed or is improperly filed. Petitioner's claim regarding equitable tolling is without merit. Petitioner waited nineteen years to bring the current petition. The parole claim was ripe for consideration at the time petitioner was first denied parole, long before the decision in *Johnson*. Lastly, regarding petitioner's claim of actual innocence. Petitioner's long wait to bring the current petition is not tempered with any claim that the factual predicate for actual innocence was not available long ago, when the petition should have been brought. The decision to wait until the last possible day to bring a state application and then the miscalculation which led to the late filing of the present petition does not require this court to bend statutory limitations that were put in place to ensure the finality of state judgments. Petitioner has waited too long to bring the current petition.

Accordingly, respondent's objection is **SUSTAINED**. Petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations. The order referring this case to the magistrate judge is hereby **VACATED**.

SIGNED this 31st day of August, 1998.

/s/ Paul Brown
PAUL BROWN
UNITED STATES
DISTRICT JUDGE

Notice set to:

David L. Botsford
William Charles Zapalac